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No. 99-629

Supreme Court, U.S.
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In The

Supreme Court of the United States

JOHN E. WHITE,

Petitioner,

v.

JANICE R. LACHANCE, DIRECTOR
OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF OF AMICI CURIAE GOVERNMENT ACCOUNTABILITY PROJECT, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, FUND FOR CONSTITUTIONAL GOVERNMENT, NATIONAL ASSOCIATION OF TREASURY AGENTS AND PROJECT ON GOVERNMENT OVERSIGHT IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does the Whistleblower Protection Act of 1989 require federal employees who expose governmental fraud, waste and abuse to establish the alleged government misconduct by "irrefragable" proof in order to qualify for relief under the Act?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICI 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. THE FEDERAL CIRCUIT ERRED BY CREATING AN UNREALISTIC STANDARD FOR PROTECTION UNDER THE WHISTLEBLOWER ACT 6

II. THE COURT BELOW ERRED BY CREATING LOOPHOLES IN THE WHISTLEBLOWER PROTECTION ACT CONCERNING "ANY" DISCLOSURE OF SPECIFIED GOVERNMENT MISCONDUCT 13

III. THE COURT ERRED BY SUBJECTING WHISTLEBLOWERS TO A PERSONAL BIAS INQUIRY AS A PREREQUISITE TO RELIEF AGAINST RETALIATION 16

CONCLUSION 18

TABLE OF AUTHORITIES

Page

CASES

Fiorillo v. Dept. of Justice, 795 F.2d 1544 (1986)....13, 16

Geyer v. Dept. of Justice, 63 M.S.P.R. 13 (1994)..... 12

Ramos v. F.A.A., 4 M.S.P.R. 388 (1980) 4, 12

Russell v. Department of Justice, 76 M.S.P.R. 317 (1997) 17

Scott v. Dept. of Justice, 69 M.S.P.R. 211 (1995) 12

SEC v. Joiner, U.S. 320 U.S. 344 (1943)..... 7

Serrao v. Merit Systems Protection Board, 95 F.3d 1569 (Fed. Cir. 1996)..... 16

White v. Lachance, 174 F.3d 1378 (Fed. Cir. 1999) ....*passim*

Willis v. Dept. of Justice, 141 F.3d 1139 (Fed. Cir. 1998)..... 16

STATUTES

Act of October 29, 1994, Pub. L. No. 103-424, 108 Stat. 4361 (1994)..... 10

Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 111 (codified in scattered sections of 5 U.S.C. (Supp. IV 1980))..... 7

Standards of Ethical Conduct of Employees of the Executive Branch, 5 C.F.R. Part 2635 (1998) 5, 16

Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (1989) 1, 11

5 U.S.C. § 2302 (b)(8)..... 4, 6, 7

5 U.S.C. § 2302 (a)(2)(xi)..... 17

TABLE OF AUTHORITIES – Continued

Page

LEGISLATIVE MATERIALS

134 CONG. REC. 29,544 (1988) 9

134 CONG. REC. 27,856 (1988) 9

134 CONG. REC. 19,981 (1988) 14

135 CONG. REC. 4,535 (1989) 9

135 CONG. REC. 5,032-33 (1989) 11

140 CONG. REC. 29,353 (1994) 15, 17

145 CONG. REC. S11445 (Daily ed., Sept, 24, 1999) 6

H.R. REP. No. 769, 103rd Cong., 2d Sess. 12 (1994) 10

H.R. REP. No. 769, 103rd Cong., 2d Sess. 15 (1994) 17

H.R. REP. No. 769, 103rd Cong., 2d Sess. 17 (1994) 14

H.R. REP. No. 769, 103rd Cong., 2d Sess. 18 (1994) 15

Markup Meetings on H.R.11280 of the House Comm. on Post Office and Civil Service, 95th Cong., 2d Sess. 22 (1978) 8

S. REP. No. 969, 95th Cong., 2d Sess. 8 (1978) 8

S. REP. No. 413, 100th Cong., 2d Sess. 13 (1988) ..11, 13

S. REP. No. 358, 103rd Cong., 1st Sess. 2-3 (1994) 10

S. REP. No. 358, 103rd Cong., 1st Sess. 10 (1994)..... 17

TABLE OF AUTHORITIES – Continued

Page

The Whistleblowers: A Report on Federal Employees Who Disclose Acts of Government Waste, Abuse and Corruption Prepared for the Senate Comm. on Governmental Affairs, 95th Cong., 2d Sess. 42-44 (1978) 8

OTHER AUTHORITIES

24 *Weekly Compilation of Presidential Documents*, pp. 1377-78 (1988): October 26, 1988, "Memorandum of Disapproval for the Whistleblower Protection Act of 1988." 9

Thomas M. Devine, *The Whistleblower's Survival Guide: Courage Without Martyrdom* (1997) 1

Thomas M. Devine, *The Whistleblower Protection Act of 1989: Foundation for the Modern Law of Employment Dissent*, 51 ADMIN. L.REV. 531 (1999) 1

Robert G. Vaughn, *Statutory Protection of Whistleblowers in the Federal Executive Branch*, 1982 U. ILL. L.REV. 615 9

Sutherland, *Statutory Construction*, sections 363, 390, 393, 395 (2d ed. 1904) 12

Webster's Deluxe Unabridged Dictionary 970 (Simon and Schuster, 1979) 12

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BRIEF OF AMICI IN SUPPORT OF PETITIONER

INTEREST OF THE AMICI[1]

The Government Accountability Project ("GAP") is a non-partisan, non-profit public interest law firm specializing in legal advocacy on behalf of "whistleblowers" – government or corporate employees who expose illegality, gross waste and mismanagement; abuse of authority; substantial or specific public health and safety dangers; or other institutional misconduct undermining the public interest.

GAP has expertise in the Act's provisions and implementation, providing oversight for protecting government employees' free speech rights. GAP attorneys have testified before Congress over the last two decades concerning the effectiveness of existing statutory protection, filed numerous *amicus curiae* briefs on constitutional and statutory issues relevant to whistleblowers, and played a leading role in advocating the Whistleblower Protection Act of 1989, P.L. 101-12, 103 Stat. 16 (April 10, 1989) ("WPA"), as well as the WPA's 1994 amendments. GAP has published material concerning the WPA and its practical realities. *See, e.g.*, Thomas M. Devine, *The Whistleblower's Survival Guide: Courage Without Martyrdom* (1997); Thomas M. Devine, *The Whistleblower Protection Act of 1989: Foundation for the Modern Law of Employment Dissent*, 51 ADMIN. L.REV. 531 (1999).

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[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or part. No person or entity, other than the *Amici Curiae*, made a monetary contribution to the preparation and submission of this brief.

The American Federation of Government Employees AFL-CIO ("AFGE"), is the national union affiliated with the AFL-CIO which specializes in representing federal employees and is the largest non-postal union representing federal employees. AFGE currently has a membership of almost 200,000, and represents a bargaining unit, almost exclusively federal employees, of almost 600,000. AFGE was instrumental in enactment of the WPA, and its members regularly claim WPA protections.

The Fund for Constitutional Government ("FCG") is a publicly-supported, charitable, non-profit corporation established in 1974 to expose and correct corruption in the federal government through research, public education, and when necessary, legal action. The Fund and its board believe that the country's leaders and decisions should be held to the standards set forth in the Constitution.

The National Association of Treasury Agents ("NATA") is a non-profit, non-partisan legal services and lobbying organization founded in 1977. Formerly incorporated as a Michigan non-profit organization in 1994, membership in NATA, Inc. is limited to active duty, former and retired criminal investigators from the U.S. Department of Treasury and its subordinate law enforcement bureaus and services, including ATF, Customs, Secret Service, IRS, Treasury Inspector General for Tax Administration, and Treasury Office of Inspector General. NATA is staffed exclusively by volunteers, including a nationwide cadre of experienced lawyers who provide many hours of pro bono legal aid to NATA members and their families. Unlike several exclusive private organizations that purport to represent the general interests of law

enforcement officers, NATA is an inclusive organization that welcomes all U.S. Treasury criminal investigators regardless of race, gender and/or ethnic background.

The Project on Government Oversight ("POGO") is a non-partisan, non-profit government watchdog whose mission is to investigate, expose and remedy abuses of power, mismanagement, and government subservience to special interests by the federal government. POGO's methods include networking with government investigators and auditors whose findings have received little government attention, working with whistleblowers inside the system who risk retaliation, and performing independent investigations.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *White v. Lachance*, Docket No. 98-3249, May 14, 1999, 174 F.3d 1378, the Federal Circuit eviscerated the WPA and its amendments. In 1992, the Petitioner, Mr. John White, a GM-13 Supervisory Education Specialist, publicly criticized Air Force changes in a contract education program. As a result, he was detailed to a reduced grade and moved to an out-of-the-way office to a position with no duties. During administrative proceedings over five years, the U.S. Merit Systems Protection Board ("MSPB" or "Board") three times ruled that the WPA protected Mr. White and ordered the Air Force to restore Mr. White to the position he held in 1992. The Board based its rulings concerning whistleblower activities on Mr. White's expertise in the education program and from governmental and non-governmental education experts.

Despite the Board's favorable rulings, the Federal Circuit held that Mr. White's disclosures were not protected by 5 U.S.C. § 2302(b)(8) as information evidencing a ***reasonable belief*** of specified government misconduct. (Emphasis added.) The Circuit Court remanded the case for a fourth round of proceedings after six years of litigation.

In so ruling, the *White* court created a new and heightened burden of proof for federal employees claiming WPA protection. This decision, if left standing, precludes almost all federal employees from protection against retaliatory federal action.

White held that to meet the "reasonable belief" test, whistleblowers must first overcome a:

> . . . presumption that public officers perform their duties correctly, fairly, in good faith and in accordance with the law and governing regulations . . . unless there is "irrefragable proof to the contrary."

(Petitioner's Appendix ("*Appendix*") at 8). This standard creates a very high initial hurdle to claim eligibility under the WPA and its prohibition against retaliation. This new and statutorily unsupportable test overrules nineteen years of Board precedent holding it unnecessary for an employee to "demonstrate" actual misconduct for WPA protection. *Ramos v. F.A.A.*, 4 M.S.P.R. 388 (1980).

In addition, this decision sends a message to federal government employees that their loyalty is not to the public, but to their superiors – to protect their jobs.

(*Appendix* at 8). This seriously undermines the government employees' code of ethics which provides the foundation for good government in the federal sector. 5 C.F.R. Part 2635 (1998) (Standards of Ethical Conduct for Employees of the Executive Branch). *White* also disqualifies challenges to illegal or otherwise improper "policy." *Id.* These evidentiary hurdles have no statutory foundations or Congressional approval.

Perhaps most chilling, *White* condoned government investigations against whistleblowers seeking the WPA's protection. Such investigations are illegal in cases of First Amendment protected speech. Also insidious is instruction to the Board to consider evidence of "the employee's personal bias or self-interestedness [sic] in the matter." *Appendix* at 8. The Federal Circuit devised this instruction in *White*. Again, the WPA does not require conflict of interest evidence, and doing so defies repeated Congressional dismissal of motive as irrelevant. Under the WPA, what counts is the information's significance for taxpayers.

In a September 24, 1999, floor speech, Senator Charles Grassley of Iowa warned the Senate that harassment against government whistleblowers was intensifying:

> This trend threatens Congress' right to know, and preserves secrecy that shields bureaucratic misconduct. . . . How did we get here?

In Senator Grassley's view one of the major problems has been the judicial activism of the Federal Circuit – grossly misinterpreting federal laws against retaliatory acts. 145

CONG. REC. S11445 (Daily ed., Sept, 24, 1999). Senator Grassley specifically referred to the:

> . . . most extreme Federal Circuit precedent, involving Air Force whistleblower John White. The precedent functionally could cancel both the whistleblower law and the Code of Ethics.

Id.

The *White* decision is only the latest in a pattern of Federal Circuit judicial activism that over a decade has eroded public servants' right to challenge governmental bureaucratic abuses. The Federal Circuit is the only court which reviews Board decisions under the WPA. This Court must accept and overturn this case to stem the Federal Circuit's inexplicable dismantling of the WPA. Finally, this Court must also require the Federal Circuit to apply a strict statutory construction.

ARGUMENT

I. THE FEDERAL CIRCUIT ERRED BY CREATING AN UNREALISTIC STANDARD FOR PROTECTION UNDER THE WHISTLEBLOWER ACT.

By mandating that federal employees meet an "irrefragable proof" rather than a "reasonable belief" test for disclosures to qualify for protection under 5 U.S.C. § 2302(b)(8), the Federal Circuit undercut an overwhelming Congressional mandate for strong employment protection of whistleblowers. The Federal Circuit's activism violated the long established doctrine that:

> . . . courts will construe the details of an Act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy.

SEC v. Joiner, 320 U.S. 344, 350-51 (1943).

No serious debate exists concerning the legislative policy and history behind 5 U.S.C. § 2302(b)(8), the statutory whistleblower defense in both the Civil Service Reform Act of 1978 (the "Reform Act") and the Whistleblower Protection Act of 1989. Since passage of the Reform Act, an increasing legislative consensus exists that protection of legitimate government whistleblowers is necessary to challenge illegality, fraud, waste, mismanagement, abuse of authority or public safety threats involving federal programs and activities. Congress highlighted whistleblower protection in the 1978 law as one of the Reform Act's most visible, significant features.

Prior to passage of the Reform Act, a massive congressional study prepared under Senator Patrick Leahy of Vermont concluded:

> The code of silence thwarts top management's ability to effectively manage and actually removes the burden of accountability from their shoulders. Fear of reprisal renders intra-agency communications a sham and compromises not only the employee, management and the Code of Ethics, but also the Constitutional function of congressional oversight itself.

The Whistleblowers: A Report on Federal Employees who Disclose Acts of Government Waste, Abuse and Corruption Prepared for the Senate Comm. on Governmental Affairs, 95th Cong., 2d Sess. 42-44 (1978).

During the House markup of the legislation, Rep. Patricia Schroeder of Colorado discussed the budgetary significance of subsequently-approved amendments strengthening whistleblower protections in the bill:

> I think that the potential savings that an amendment like this might incur to the taxpayers is phenomenal. . . . [I]n the long run, we are going to find that this is one of the most cost-saving amendments we could adopt.

Markup Meetings on H.R. 11280 of the House Comm. on Post Office and Civil Service, 95th Cong., 2d Sess. 22 (1978).

The Senate Report accompanying the legislation reaffirmed Rep. Schroeder's observations:

> What is needed is a means to protect the Pentagon employee who discloses billions of dollars in cost overruns, the GSA employee who discloses widespread fraud, and the nuclear engineer who questions the safety of certain nuclear power plants.

S. Rep. No. 969, 95th Cong., 2d Sess. 8 (1978).

As one commentator noted:

> The ideological breadth of the coalition supporting whistleblower protection indicates that the passage of these provisions is a strong congressional statement in support of the legitimacy of whistleblowing.

Vaughn, *Statutory Protection of Whistleblowers in the Federal Executive Branch*, 1982 U. ILL. L.REV. 615, 619-620.

Passage of the Whistleblower Protection Act of 1989 strengthened this mandate. While Congress seldom passes any significant legislation unanimously, due to a pocket veto, this law received unanimous approval twice in the House in just over five months, with an earlier unanimous approval in the Senate. 134 CONG. REC. 27,856 (1988); 134 CONG. REC. 29,544 (1988); 135 CONG. REC. 4,535 (1989).

Speaking in favor of the new legislation in his floor statement, Senator William Roth of Delaware expressed frustration with the "massive and perplexing problem of Government waste and fraud. . . . " He added the problem would remain unsolved unless civil service employees "exercise their civic duty and report any wrongdoing they see in the workplace." As he warned, however:

> [W]e are fooling ourselves if we believe this can occur without having adequate protections in place that will protect those employees who risk their jobs and career to expose the problems of waste and fraud in Government."

134 CONG. REC. 29,544 (1988).

When President Reagan vetoed the Whistleblower Protection Act of 1988, S. 508, he claimed support for the concept, but raised Constitutional objections to the legislation's technical provisions. 24 *Weekly Compilation of Presidential Documents*, p. 1377-78 (1988): October 26, 1988 "Memorandum of Disapproval for the Whistleblower Protection Act of 1988." President George Bush, however,

affirmed the importance of whistleblowers for ensuring government accountability when he signed the Whistleblower Protection Act of 1989. 25 *Weekly Compilation of Presidential Documents*, pp. 515-517 (1989): April 10, 1989, "Presidential Remarks and Statement on Signing the Whistleblower Protection Act of 1989."

The mandate further intensified with the 1994 amendments strengthening employee rights under the WPA. Act of Oct. 29, 1994, Pub. L. No. 103-424, 108 Stat. 4361 (1994). Congress acted for a fundamental reason – the original law had failed. As the House Post Office and Civil Service Committee explained:

> Unfortunately, while the Whistleblower Protection Act is the strongest free speech law that exists on paper, it has been a counterproductive disaster in practice. The WPA has created new reprisal victims at a faster pace than it is protecting them.

H.R. REP. No. 769, 103rd Cong., 2d Sess. 12 (1994). The House Report referenced an MSPB survey finding:

> . . . that, by a 60-23 margin, employees do not believe their rights will help them, and fear of reprisal remains as strong a reason why would-be employees remain silent as in 1983.

Id., at 13, citing MSPB: Office of Policy Evaluation, Merit Systems Protection Board, *Whistleblowing in the Federal Government: An Update* (1993). *See also*, S. REP. No. 358, 103rd Cong., 1st Sess. 2-3 (1994).

The Senate referenced a General Accounting Office ("GAO") study and emphasized MSPB survey findings that only:

> . . . [h]alf of the employees who witnessed such illegal or wasteful acts said they had reported it.

Id. at 3.

The strongest warning from Congress appeared in the Senate report accompanying initial passage of the Act:

> The Committee intends that disclosures be encouraged. The [O]ffice of the Special Counsel (OSC), the Board and ***the courts*** should not erect barriers to disclosures which will limit the necessary flow of information from employees who have knowledge of government wrongdoing."

S. REP. No. 413, 100th Cong., 2d Sess. at 13.[2] (Emphasis added).

Despite this crystal-clear legislative intent, the Federal Circuit decreed in *White* that disclosures cannot meet the "reasonable belief" test unless the whistleblower presents "irrefragable proof" that the suspected government officials failed to act:

> correctly, fairly, in good faith and in accordance with the law and governing regulations. . . .

(*Appendix* at 8) (Citations omitted).

Although the court did not describe the "irrefragable" test, the term's definition proves the Federal Circuit created a virtually insurmountable barrier. Webster's Dictionary defines "irrefragable" as "incapable of being

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[2] Congress specifically incorporated the exhaustive legislative history of the 1988 bill into that controlling the Whistleblower Protection Act of 1989. 135 CONG. REC. 5032-33 (1989) (Explanatory statement on S. 20).

refuted; unanswerable; incontestable." *Webster's Deluxe Unabridged Dictionary* 970. (Simon and Schuster, 1979). Absent some extraordinary event such as a related confession or conviction for criminal misconduct of these same suspected officials, a whistleblower's hopes of protection are a fantasy.

This new barrier also cannot survive scrutiny under elementary canons of statutory construction. A long-established rule requires courts to give effect to the clear meaning of all words in a statute, absent ambiguous language. Sutherland, *Statutory Construction*, Sections 363, 390, 393, 395 (2d ed. 1904). The "irrefragable" standard replaces the less stringent requirement that a protected disclosure "evidences" a "reasonable belief" with the burden to actually prove the charges. This new barrier overrules nineteen years of MSPB case law holding that a whistleblower need not "demonstrate" or "prove" the alleged misconduct to gain protection under the WPA. *Ramos*, 4 M.S.P.R. at 392; *Geyer v. Dept. of Justice*, 63 M.S.P.R. 13, 17 (1994); *Scott v. Dept. of Justice*, 69 M.S.P.R. 211, 237 (1995). Requiring evidence incapable of being refuted rises above requiring proof beyond a reasonable doubt. After *White*, obtaining a felony conviction requires a lower standard than for a whistleblower's disclosure to qualify for protection.

II. THE COURT BELOW ERRED BY CREATING LOOPHOLES IN THE WHISTLEBLOWER PROTECTION ACT CONCERNING "ANY" DISCLOSURE OF SPECIFIED GOVERNMENT MISCONDUCT.

In *White*, the Federal Circuit defied Congress' decade-long effort to eliminate judicially-imposed loopholes. In the WPA, Congress replaced the Reform Act's statutory language protecting "a" disclosure of significant misconduct to protection for "any" disclosure that otherwise qualifies. This change responded to loopholes the Federal Circuit created in *Fiorillo v. Department of Justice*, 795 F.2d 1544 (1986). There, the court rejected protection for speech unless the whistleblower was the first to disclose misconduct. Otherwise, the disclosure was "stale." *Id.* at 1550. The Federal Circuit also rejected protection absent proof that:

> the primary motivation of the employee [was] to inform the public on matters of public concern, and not personal vindictiveness.

Id. at 1550.

In switching from "a" to "any," Congress specifically cited *Fiorillo*. The Senate Governmental Affairs Committee emphasized the Federal Circuit's inappropriate judicial activism concerning employee motives.

> The court reached this conclusion despite the lack of any indication in CSRA that an employee's motives are supposed to be considered in determining whether a disclosure is protected.

S. REP. No. 413, 100th Cong., 2d Sess. 13 (1988).

As explained in the Senate Report,

> For example, it is inappropriate for disclosures to be protected only if they are made for certain purposes or only if the employee is the first to raise the issue. S. 508 emphasizes this point by changing the phrase "a" disclosure to "any" disclosure in the statutory definition.

Id.

In a floor statement prior to the Senate's first unanimous vote approving the Act, Senator Carl Levin unequivocally reaffirmed the purpose of modifying the statutory language was to preclude consideration of:

> . . . such factors as whether the employee was the first person to make the disclosure, whether the disclosure was made to someone other than the responsible agency official, what the motives of the employee may have been in making the disclosure, or other similar factors, in determining whether a disclosure is protected.

134 CONG. REC. 19,981 (1988).

The Federal Circuit did not desist. In the legislative history to the 1994 amendments, Congress sharply noted that further modifications to statutory language were necessary, because:

> . . . [t]he body of case law developed by the Board and Federal Circuit has represented a steady attack on achieving the legislative mandate for effective whistleblower protection.

H.R. REP. No. 769, 103rd Cong., 2d Sess. 17.

Concerning Board-created loopholes, Congress stated:

> Perhaps the most troubling precedents involve the Board's inability to understand that 'any' means 'any.' The WPA protects 'any' disclosure evidencing a reasonable belief of specified misconduct. . . . The only restrictions are for classified information or material the release of which is specifically prohibited by statute. Employees must disclose that type of information through confidential channels to maintain protection; otherwise there are no exceptions.

Id. at 18.

In the only legislative history for the composite amendments, House Civil Service Subcommittee Chairman Pete McCloskey, lead sponsor for the amendments, stated:

> It also is not possible to further clarify the clear statutory language that protection for 'any' whistleblowing disclosure evidencing a reasonable belief of specified misconduct truly means 'any.' A protected disclosure may be made as part of an employee's job duties, may concern policy or individual misconduct, and may be oral or written and to any audience inside or outside the agency, without restriction to time, place, motive or context.

140 CONG. REC. 29,353 (1994)

Nonetheless, in *White* the Federal Circuit restored, created and announced the validity of three loopholes eliminating protection for disclosures that are deemed to be: *(a)* " . . . a weapon in arguments over policy" (*Appendix* at 8); *(b)* motivated by "personal bias or self-interestedness [sic] in the matter" (*id.* at 8); or *(c)* an attack on

the right of loyalty to which "[p]olicymakers and administrators have every right to expect" from subordinates. (*Id.* at 6). As to the last disqualification, federal employees must now proceed at their own risk to honor the Standards of Ethical Conduct to

> disclose wase, fraud, abuse, and corruption to appropriate authorities.

5 C.F.R. Part 2635 (1998).[3]

III. THE COURT ERRED BY SUBJECTING WHISTLEBLOWERS TO A PERSONAL BIAS INQUIRY AS A PREREQUISITE TO RELIEF AGAINST RETALIATION.

The Federal Circuit proved it is out of conformance with the letter and spirit of the WPA when it instructed the Board to seek evidence of " . . . personal bias or self-interestedness [sic] in the matter," by " . . . the putative whistleblower and his similarly situated supporters. . . . " (*Appendix* at 8). This directive reinstitutes the congressionally rejected *Fiorillo* doctrine of examining personal motives irrelevant to public policy concerns. Also, by extending this to the whistleblower's supporters, the court fosters isolating whistleblowers.

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[3] The *White* loopholes are only the latest salvo in an intensifying Federal Circuit pattern and practice to transform "any" into "almost none." *See, e.g., Willis v. Department of Agriculture*, 141 F.3d 1139, 1144 (Fed. Cir. 1998) (WPA does not cover otherwise protected disclosures made as part of an employee's job duties); *Serrao v. Merit Systems Protection Board*, 95 F.3d 1569, 1576 (Fed. Cir. 1996) (protection is unavailable for whistleblowing disclosures made in the context of a personnel grievance).

The Federal Circuit institutionalizes a personnel practice prohibited since the 1994 amendments. The legislative history of a new personnel action, 5 U.S.C. § 2302(a)(2)(xi) bans:

> any harassment or discrimination that could have a chilling effect on whistleblowing or otherwise undermine the merit system. . . .

140 CONG. REC. 29,353 (1994). The WPA was amended to cover:

> any action taken to discriminate or retaliate against a whistleblower because of his/her protected conduct, regardless of what form it may take.

S. REP. No. 358, 103rd Cong., 1st Sess. 10 (1994). Representative McCloskey's floor statement introducing the final consensus bill emphasized that:

> the techniques to harass a whistleblower are limited only by the imagination.

Id.

Retaliatory investigations against the whistleblower are a means to discount the disclosure. Rep. McCloskey specifically identified retaliatory investigations as one of the prohibited forms of harassment. 140 CONG. REC. 29,353 (1994); *see also* H.R. REP. No. 769, 103rd Cong., 2d Sess. 15. The Board has honored the new prohibition by outlawing retaliatory investigations. *Russell v. Department of Justice*, 76 M.S.P.R. 317, 323-24 (1997).

Ignoring this legislative history and Board case law, the Federal Circuit has resurrected retaliatory investigations for whistleblowers and supporting witnesses. As

with the above rulings, *White's* investigative requirement frustrates the Whistleblower Protection Act's Congressional mandate and transforms the law into a vehicle that facilitates secrecy instead of fostering Congressional will and the public's right to know about abuses in the federal government.

CONCLUSION

For the above reasons, this Court should grant the petition.

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